Supreme Court, U.S.
FILED
APR 2 - 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-

IN THE

Supreme Court of the United States

HUSAIN RAFIK KURJI,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER HELT
THE HELT LAW GROUP, LLC
1754 West Lunt Avenue
Chicago, Illinois 60654
(312) 266-0531 x701
Toll free (888)739-6794
Facsimile (312) 881-4138

Attorneys for Petitioner

222109

CP
COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

There is a tension between the provisions of 8 U.S.C. § 1255(i), enacted by the Legal Immigration Family Equity Act ("LIFE Act"), Pub. L. No. 106553, 114 Stat. 2762A-143 through 149 (2000), as amended by the LIFE Act Amendments of 2000 ("Life Act Amendments"), Pub. L. No 106-554, 114 Stat. 2763A-324 through 328 (2000); and the provisions of section 8 U.S.C. § 1229a providing for the procedure for removal of aliens; and the jurisdiction stripping provisions of 8 U.S.C. § 1252(a)(2)(B) regarding discretionary actions of the Attorney General.

May the government by commencing removal proceedings, and determining under its regulations what cases will be continued and what cases reopened, defeat the lengthy legalization process contemplated by 8 U.S.C. § 1255(i) in contravention of Congressional intent? What are the parameters for judicial review of these proceedings?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
DISCUSSION	8
CONCLUSION	21

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed January 7, 2009 ..... 1a

Appendix B — Decision Of The Board Of Immigration Appeals Dated November 27, 2007 ..... 4a

TABLE OF CITED AUTHORITIES

Page

Cases

Ahmed v. Gonzales,
447 F.3d 433 (5th Cir. 2006) 9, 14, 16

Ahmed v. Gonzales,
465 F.3d 806 (7th Cir. 2006) 9, 16

Ali v. Gonzales,
448 F.3d 515 (2d Cir. 2006) 11

Bernier v. Bernier,
147 U.S. 242 (1893) 16

Branch v. Smith,
538 U.S. 254 (2003) 17

Calle-Vujiles v. Ashcroft,
320 F.3d 472 (3d Cir. 2003) 11

Chacku v. U.S. Att'y Gen.,
555 F.3d 1281 (11th Cir. 2008) 9

Connecticut Dept. of Income Maintenance v. Heckler, 471 U.S. 524 (1985) 16

Ekimian v. INS,
303 F.3d 1153 (9th Cir. 2002) 12

Enriquez-Alvarado v. Ashcroft,
371 F.3d 246 (5th Cir. 2004) 8, 11, 13-14

Cited Authorities

Page

Great Northern Ry. Co. v. United States,
208 U.S. 452 (1908) 16

Haswanee v. U.S. Att'y Gen.,
471 F.3d 1212 (11th Cir. 2006) 9, 11, 16

Ill. Central Railroad Co. v. Commonwealth,
64 S.W. Rep. 975 (C.A. Ill. 1901) 17

Lenis v. U.S. Att'y Gen.,
525 F.3d 1291 (11th Cir. 2008) 11

McChord v. Louisville,
183 U.S. 483 (1902) 17

Merchant v. U.S. Att'y Gen.,
461 F.3d 1375 (11th Cir. 2006) 9, 11, 14, 16

Onyinkwa v. Ashcroft,
376 F.3d 797 (8th Cir. 2004) 13

Rajah v. Mukasey,
544 F.3d 449 (2d Cir. 2008) 8

Ramos-Bonilla v. Mukasey,
543 F.3d 216 (5th Cir. 2008) 8

Rankin Landscaping, Inc. v. Chao,
No. 1:08-cv-244-JCC-TRJ (E.D.Va. 2009) 4

Cited Authorities

Page

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 16

Singleton v. Wulff,
428 U.S. 106 (1976) 20

Subhan v. Ashcroft,
383 F.3d 591 (7th Cir. 2004) 9, 14, 15, 16

Yerkovich v. Ashcroft,
381 F.3d 990 (10th Cir. 2004) 13

Zafar v. U. S. Att'y Gen.,
461 F.3d 1357 (11th Cir. 2006), *rehr'g en banc*,
473 F.3d 1350 (11th Cir. 2007) ..... *passim*

Zhao v. Gonzales,
404 F.3d 295 (5th Cir. 2005) 13

Administrative Cases

Matter of Jean,
23 I&N Dec. 373 (A.G. 2002) 8

Matter of J-J-,
21 I&N Dec. 976 (BIA 1997) 8

Cited Authorities

Page

Statutes

8 U.S.C. § 1153(b)(C) 3

8 U.S.C. § 1158(a) 13

8 U.S.C. § 1227 ..... 5, 19

8 U.S.C. § 1227(a)(1)(B) 6

8 U.S.C. § 1229 4

8 U.S.C. § 1229a .....i, 13, 15, 20

8 U.S.C. § 1229c 7

8 U.S.C. § 1231(b)(3)(A) 7

8 U.S.C. § 1252(a)(2)(B) ..... *passim*

8 U.S.C. § 1252(a)(2)(B)(ii) 13

28 U.S.C. § 1254(1) 1

8 U.S.C. § 1255(a) 4, 19

8 U.S.C. § 1255(c) 4, 17, 19

8 U.S.C. § 1255(i) ..... *passim*

Cited Authorities

	Page
8 U.S.C. § 1255(i)(1)(B)(i)	6
8 U.S.C. § 1255(i)(1)(B)(ii)	6
8 U.S.C. § 1255(i)(2)(A)	11
8 U.S.C. § 1255(i)(2)(B)	11
28 U.S.C. § 1361	12
28 U.S.C. § 1651	12
28 U.S.C. § 2241	12
INA § 208(a)	12
INA § 212(a)(5)(A)	4
INA § 212(h)	12
INA § 212(i)	12
INA § 240A	12
INA § 240B	12
INA § 245	12

Cited Authorities

Page

Regulations

8 C.F.R. § 214.1(f) 10

8 C.F.R. § 264.1(f)(4) 10

8 C.F.R. § 1003.2(c)(2) 8

8 C.F.R. § 1245.10(a)(1)(i) 4

Public Laws

Immigration Reform and Control Act of 1986 [IRCA] 18

Legal Immigration Family Equity Act ("LIFE Act"), Pub. L. No. 106553, 114 Stat. 2762A-143 through 149 (2000) ..... *passim*

LIFE Act Amendments of 2000 ("Life Act Amendments"), Pub. L. No 106-554, 114 Stat. 2763A-324 through 328 (2000) ..... i, 1, 2

Treaties

Article 3 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature February 4, 1985, S. Treaty Doc. No. 100-20 (1988), 23 I.L.M. 1027 (1984) 7

Page

Additional Authorities

146 Cong. Rec. S11850-02 (daily ed. Dec. 15, 2000) 18

67 Fed. Reg. 52,584 (Aug. 12, 2002) 10

Joint Memorandum Concerning the Legal Immigration Family Equity Act of 2000, published on December 15, 2000 17

OPINIONS BELOW

The unpublished *per curiam* decision of the Fifth Circuit Court of Appeals, filed January 7, 2009, *sub nom Husain Rafik Kurji v. Michael B. Mukasey, U.S. Attorney General*, Case No. 07-61005 (2009) is attached to the Appendix as Exhibit "A." The Decision of the Board of Immigration Appeals, dated November 27, 2007, is attached to the Appendix as Exhibit "B."

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition for Writ of Certiorari is being filed within ninety days of the above referenced *per curiam* decision of the Fifth Circuit Court of Appeals.

STATEMENT OF THE CASE

1. The LIFE Act and the Removal Statute:

This case involves the provisions of LIFE Act and the LIFE Act Amendments, codified at 8 U.S.C. § 1255(i),[1] by which Congress provided a means of legalization to aliens illegally present in the United States. The Life Act Amendment extended the sunset of 8 U.S.C. § 1255(i) until April 30, 2001. 8 U.S.C. § 1255(i) in pertinent part provides as follows:

> 1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

[1] All references to the LIFE Act hereinafter are to the LIFE Act as amended by the LIFE Act Amendments of 2000.

(A) who — (i) entered the United States without inspection; or (ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of —

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application . . .

. . . .

> (2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if —
>
> (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
>
> (B) an immigrant visa is immediately available to the alien at the time the application is filed.

The legalization process, particularly for those aliens who become eligible under 8 U.S.C. § 1255(i) for eventual adjustment by means of an application for labor certification, can be quite lengthy since at least two separate agencies must be involved in the adjudication of the different applications required to attain adjustment. The labor certification process is assigned to the United States Department of Labor (DOL), whereas the petition to classify an alien as a skilled worker (Form I-140) was adjudicated by the legacy Immigration and Naturalization Service (INS) and is now adjudicated by the Department of Homeland Security (DHS). *See*, 8 U.S.C. § 1153(b)(C) (requiring a labor certification for skilled workers); 20 C.F.R. § 656 et seq. (providing for the labor certifications procedure). The actual adjustment of status (the adjudication of Form I-485) could be done either by INS, now by DHS

or as relief from deportation before the Immigration Judge (IJ).[2]

However, under 8 U.S.C. § 1229, the government may at any time begin removal proceedings against any alien "grandfathered"[3] into the Act on the very grounds of inadmissibility removed by Congress as impediments to adjustment of status in 8 U.S.C. § 1255(i).[4] These

---

[2] Without counting the delays in the processing of the I-140, an alien may find himself or herself in the position of having to wait a number of years for the DOL adjudication. *See. e.g., Zafar v. U. S. Att'y Gen.*, 461 F.3d 1357 (11th Cir. 2006), rehr'g en banc, 473 F.3d. 1350(11th Cir. 2007) (labor certification applicataion filed on 2001, still not adjudicated at the time of appeal decision); *Rankin Landscaping, Inc. v. Chao*, No. 1:08-cv-244-JCC-TRJ (E.D.Va. 2009)(five years)

[3] "Grandfathered alien means an alien who is the beneficiary . . . of [a] petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed; or . . . [a]n application for labor certification under section 212(a)(5)(A) of the Act that was properly filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001, and which was approvable when filed." 8 C.F.R. § 1245.10 (a)(1)(i).

[4] These impediments to adjustment are the lack of inspection and admission (8 U.S.C. § 1255(a)) and the following impediments at 8 U.S.C. § 1255(c).

"Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to (1) an alien crewman; (2) subject to subsection

(Cont'd)

impediments to adjustment also constitute grounds of inadmissibility which pursuant to 8 U.S.C. § 1227(a)(1)(A) cause an alien to be removable. *Id.* (Inadmissible aliens. — Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.). Such grounds of inadmissibility which render the alien removable are *inter alia* presence without admission or parole (8 U.S.C. § 1182(a)(6)(A)(i) and overstaying one's authorized stay (8 U.S.C. § 1227(a)(1)(C)(i)). Both these categories of aliens, although removable pursuant to 8 U.S.C. § 1227, are eligible for the benefits of 8 U.S.C. § 1255(i), provided they fulfilled the requirements the statute, e.g.,

---

(Cont'd)

(k), an alien (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101(a)(27)(H) , (I) , (J) , or (K)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; (3) any alien admitted in transit without visa under section 212(d)(4)(C) ; (4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217; (5) an alien who was admitted as a nonimmigrant described in section 101(a)(15)(S) ; (6) an alien who is deportable under section 25.(a)(4)(B); (7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3), or who has otherwise violated the terms of a nonimmigrant visa."

filing a labor certification application or a visa petitions prior to the sunset of the LIFE Act. *See*, 8 U.S.C. §§ 1255(i)(1)(B)(i) & (ii).

The decisions we discuss below have not focused on this underlying and sweeping tension between these two section of the Immigration and Naturalization Act (INA or the Act), 8 U.S.C. § 1101 et seq. The conflict between the circuit decisions examining cases of aliens grandfathered into 8 U.S.C. § 1255(i) who find themselves in removal proceedings because of absence of documents have focused on the effect of certain procedural aspects of deportation proceedings, such as the conditions under which continuances should be granted. The fact that continuances and motions to reopen are discretionary then brings another section of the Act into conflict with 1255(i), i.e., the jurisdiction stripping provisions of 1252(a)(2)(B).

2. The Petitioner is a twenty nine (29) year old male, who is a native and citizen of India. Appendix at Exhibit "C". The Petitioner entered the United States on December 6, 1999, as a non-immigrant visitor with authorization to stay until February 7, 2000. He filed an application for asylum on July 6, 2000 with the legacy INS. Respondent also filed an application for labor certification with the Department of Labor prior to April 30, 2001, thereby becoming grandfathered pursuant to 8 U.S.C. § 1255(i).

On August 23, 2002, INS issued and served on the Petitioner a Notice to Appear (NTA) charging him with a violation of 8 U.S.C. § 1227(a)(1)(B) for overstaying his period of authorized stay. At a hearing on January

7, 2003, Petitioner admitted the allegations of the NTA and the charges of removability. As relief from removal, he applied for asylum pursuant to 8 U.S.C. § 1158; withholding of removal pursuant to 8 U.S.C. § 1231 (b)(3)(A); withholding of removal under Article 3 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature February 4, 1985, S. Treaty Doc. No. 100-20, at 20 (1988), 23 I.L.M. 1027, 1028 (1984) ("CAT"); voluntary departure pursuant to 8 U.S.C. § 1229c.

On October 10, 2003, the IJ found Petitioner removable as charged and denied all requests for relief. The Petitioner filed a timely appeal with the Board of Immigration Appeals (BIA), which summarily affirmed the IJ's decision without issuing an opinion on April 27, 2004. On May 27, 2004 the Petitioner, through counsel, filed a motion to reconsider which was also denied on or about April 27, 2004. Within thirty days of that decision the filed a Petition for Review with the Fifth Circuit Court of Appeals.

On or about June, 2005, while the appeal to the Fifth Circuit was pending, Petitioner's labor certification application was approved. An I-140 petition was filed with DHS soon thereafter. DHA approved the I-140 petition on October 18, 2005, two months after the Fifth Circuit denied his Petition for Review.

Petitioner then filed with the BIA a motion to reopen, reconsider and remand removal proceedings. On November 27, 2007, the BIA denied the motion citing as a reason for its decision that the motion had been filed more than ninety (90) days from the Board's final

decision on July 9, 2004, in contravention to 8 C.F.R. § 1003.2(c)(2) and declining to reopen "*sua sponte*" because the case did not present "exceptional circumstances" required for *sua sponte* reopening by Board precedent citing *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) and *Matter of Jean*, 23 I&N Dec, 373 (A.G. 2002). The Board also cited *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004) for the proposition that the Fifth Circuit had held that it lacked jurisdiction to review IJ's refusal to exercise *sua sponte* authority). The Petitioner filed a motion to reconsider with the BIA.

While that motion was pending Petitioner filed a Petition for Review with the Fifth Circuit. On January 7, 2009 the Fifth Circuit dismissed the petition on the basis that it lacked jurisdiction to consider the BIA's refusal to exercise its "*sua sponte*" reopening powers, citing as support *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008).

DISCUSSION

1. Without dealing specifically with "*sua sponte*" reopening, other circuits have grappled with the issue of how to harmonize the Congressional intent expressed in the ameliorative provisions of 8 U.S.C. § 1255(i) with the procedural strictures imposed by immigration regulations, which become operative once removal proceedings start. *See*, *Rajah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008) (review of denial of a continuance requested where petitioner timely filed a labor certification which jointly with I-140 would permit him to adjust but DOL had not yet adjudicated the matter

some six (6) years later); *Chacku v. U.S. Att'y Gen.*, 555 F.3d 1281 (11th Cir. 2008) (review of denial of a continuance where labor certification adjudicated during pendency of appeal but visa number not yet available); *Zafar*, 473 F.3d (review of denial of a continuance where alien was also grandfathered but DOL has not yet adjudicated his labor certification); *Merchant v. U.S. Att'y Gen.*, 461 F.3d 1375 (11th Cir. 2006) (review of denial of a continuance where Petitioner had an approved labor certification and a pending I-140 and I-485); *Haswanee v. U.S. Att'y Gen.*, 471 F.3d 1212 (11th Cir. 2006) (review of denial of a continuance where the Petitioner had an approved labor certification, an available visa number and his I-140 was pending with DHS); *Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. 2006) (petition for review of denial of a continuance where the labor certification not yet adjudicated at the end of five years); *Ahmed v. Gonzales*, 465 F.3d 806 (7th Cir. 2006) (petition for review of denial of a continuance by family based grandfathered alien where the visa number not yet available and to speed up the process alien also requests a continuance to file a labor certification); *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004) (petition for review of denial of a continuance where the alien is grandfathered but where the DOL had not yet adjudicated the labor certification as of the time of appeal).

We note especially that in all cases reviewed the delays in adjudicating the labor certification or the I-140 necessary to obtain adjustment pursuant to 1255(i) are attributable solely to the government, be it to DOL,

INS or DHS.[5] But it is evident that to defeat an aliens statutory rights to pursue adjustment the government need only commence removal proceedings during the lengthy process (sometimes as long as seven years) required to obtain a labor certifications or an available visa number. Although we have not preserved and do not launch an equal protection challenge, it is also evident from the cases cited above that the government is in a position to focus on the removal of aliens in particular groups that come to their attention through some other means. The Court will note that many of these petitioners are Pakistani or East Indians who were required by the National Security Entry-Exit Registration System ("NSEERS") to register with the United States Government.[6]

Once the government chooses to initiate proceedings it drags on the adjudication process, the alien and the circuit courts to which he may appeal his case meet several thorny questions:

a) First, to restate the obvious, 8 U.S.C. § 1255(i) is not an automatic avenue of relief from removal. 8 U.S.C.

---

[5] We do not argue here cases or situations where the alien is at fault for the delays because of his or her lack of compliance with or alacrity in meeting the steps leading to adjustment.

[6] NSEERS required all nonimmigrant males from twenty-five designated countries, who were sixteen (16) years or older, to register with DHS, submit various documents, be fingerprinted and photographed. See 8 C.F.R. §§ 214.1(f), 264.1(f)(4). They were also required to report to DHS "upon arrival, approximately 30 days after arrival; every twelve months after arrival; upon certain events, such as a change of address, employment or school; and at the time they leave the United States." 67 Fed. Reg. 52,584 (Aug. 12, 2002).

§ 1255(i)(2)(A) & (B) require that "the alien [be] eligible to receive an immigrant visa and [be] admissible to the United States for permanent residence;" and "[that] an immigrant visa [be] immediately available to the alien at the time the application is filed."

b) When the alien requests a continuance to allow the government to finally adjudicate the numerous application required for adjustment — or as in this case, asks for "*sua sponte*" reopening once the government has finally done its duty — he runs smack into the face of a number of discretionary procedural decisions, which most courts have trouble harmonizing with the jurisdiction stripping provisions of 1252(a)(2)(B). Continuances are understood to be committed to the IJ's discretion to be granted for "good cause shown." 8 C.F.R. § 1003.29. *See, e.g., Haswanee*, 471 F.3d at 1214; *Merchant*, 461 F.3d at 1377; *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249-50 (5th Cir. 2004). But as we shall see what constitutes good cause changes from circuit to circuit.

Sua sponte reopening is also generally understood to be a discretionary decision. *See, e.g., Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006) ("a decision of the BIA whether to reopen a case *sua sponte* under 8 C.F.R. § 1003.2(a) is entirely discretionary and therefore beyond our review"); *Enriquez-Alvarado*, 371 F.3d at 250 ("[A] reviewing court has no legal standard against which to judge an IJ's decision not to invoke its *sua sponte* authority, . . . [hence] this Court lacks jurisdiction."); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003) (no jurisdiction review entirely

discretionary decisions although "if an agency announces and follows — by rule or by settled course of adjudication — a general policy by which its exercise of discretion will be governed, that exercise may be reviewed for abuse."); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002) (lack jurisdiction for review).

c) Of course the reason why courts perceive a lack of jurisdiction over discretionary decisions is yet a third conflicting provision of the Act, 8 U.S.C. § 1252(a)(2)(B) which states that the following are "[m]atters not subject to judicial review"

> Denials of Discretionary Relief.- Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-
>
> (i) any judgment regarding the granting of relief under section 212(h) , 212(i) , 240A , 240B, or 245, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for *which is specified under this title to be in the discretion of the Attorney General* or the Secretary of Homeland Security, other than the granting of relief under section 208(a).

The Courts that have had to grapple with these seemingly inconsistent provisions, have resolved the cases before them in a variety of ways. Notwithstanding any other provision of the Act, the Eighth and the Tenth Circuit in *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004), and *Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004), have both held that they lack jurisdiction to review denials of continuances pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii)[7]. *See, Zhao v. Gonzales*, 404 F.3d 295, 303 n.6 (5th Cir. 2005) (refusing to endorse *Onyinkwa's* interpretation of § 1252(a)(2)(B)(ii) to the effect that "any statutorily authorized regulation conferring discretion necessarily forecloses judicial review [pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii)].") These two circuits then have given full force and effect to 8 U.S.C. § 1252(a)(2)(B) and to 8 U.S.C. § 1229a, but have simply ignored any statutory rights of the Petitioner pursuant to 8 U.S.C. § 1255(i). *See also, Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005) (no jurisdiction to review denials of continuances to grandfathered alien in removal proceedings).

Although the Fifth Circuit believes that it does have jurisdiction to review those discretionary decisions not specifically foreclosed by 1252(a)(2)(B), its decisions fall on the side of the government's power to remove grandfathered aliens not immediately eligible for adjustment. *See, Enriquez-Alvarado v. Ashcroft*, 371

---

[7] "Notwithstanding any other provision of law, no court shall have jurisdiction to review any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title." 1252(a)(2)(B)(ii)

F.3d at 249 – 50; *Ahmed v. Gonzales*, 447 F.3d at 436. One could characterize this circuit as favoring the power of the government granted by 1229a.

The Eleventh Circuit has steered a middle course. It has held that where an alien has already obtained a labor certification and the only requirement lacking for a grant of adjustment is that DHS adjudicate his I-140 petition, then under 1255(i), he is "eligible" for adjustment. Eligibility is sufficient because the statute does not require that the alien have "the visa in hand." *Merchant*, 461 F.3d at 1378. Thus it was an abuse of discretion to deny Petitioner a continuance to wait for the I-140 adjudication. *Id.* at 1379. On the other hand where the Petitioner had not yet had his labor certification granted, there was no abuse of discretion in the agency denying a continuance. *Zafar*, 473 F.3d at 1351 – 53. The Court remarked that there was no provision in 1255(i) to keep the government from deporting an alien in the process of legalization. *Id.* at 1352.

The Seventh Circuit has been by far the most favorable circuit towards its Petitioners. In *Subhan*, *supra*, the Petitioner asked for three continuances yet the DOL did not manage to adjudicate his labor certification application, although a year had elapsed. 383 F.3d at 593. On the petition for review from the denial of the third continuance the Court held that the reason given by the agency was merely a statement as to the procedural posture of the case: the petitioner was not yet eligible for adjustment because the applications had not been adjudicated. This holding, said the Seventh Circuit, did not give a valid reason for denial, such as

petitioner's lack of due diligence, and hence it was arbitrary. *Id.* at 593 – 94.

In *Ahmed*, *supra*, the Seventh Circuit was even more generous. 465 F.3d 806. Ahmed had also been grandfathered into 1255(i) through a family based petition, but the visa number was not yet current because the petitioner was his sibling, corresponding to a visa category which was still backlogged two years at that point. *Id.* at 807. In an effort to expedite his adjustment of status, Ahmed requested a continuance to file a labor certification application with the DOL, thinking, contrary to our experience so far, that DOL might move faster than the visa numbers. *Id.* Reversing the denial of the continuance by the agency, the Seventh Circuit held that the denial of the continuance was arbitrary where neither the BIA nor the IJ had dealt with the pending family based petition. *Id.* at 810. One must applaud the Seventh Circuit for the elegance with which it has side-stepped all issues regarding the discretionary aspect of continuances. But alas we may not equate our case to the continuance cases insofar as there is no court in the land that disagrees that the denial of a *sua sponte* motion is discretionary and not reviewable.

We bring this case because we see a more fundamental issue than the procedural roadblocks facing a grandfathered alien in removal proceedings or the parameters of judicial review of discretionary actions. At issue are the fundamentally conflicting provisions of three (3) statutes: 8 U.S.C. §§ 1255(i), 1229(a), and 1252(a)(2)(B). The issue of conflicting statues is one that has already been confronted and

resolved by this Court as early as the end of the nineteenth century. *See*, *Bernier v. Bernier*, 147 U.S. 242, 246 (1893). Inconsistent sections of a statute must be construed not to repeal each other but to operate in harmony. *Id.*

There can be no doubt that these three (3) sections of the Act are indeed at loggerheads. However we can rely on that well settled principle of statutory construction we just mentioned requiring that all sections of a statue be given effect and be conformed to each other. *See*, *e.g.*, *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524, 530, and n. 15 (1985) (statute must be construed to give effect to all its language); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908)

> "under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions";

Bernier, 147 U.S. at 246.

2. Generally the Circuit courts have not faced head on this issue of the conflicting provisions of the three (3) statutes mentioned. *See*, *e.g.*, *Haswanee*, *supra*; *Ahmed*, *supra* (5th Cir.); *Ahmed*, *supra* (7th Cir.); *Subhan*, *supra*; *Merchant*, *supra*; *Zafar*, *supra*. The

conflict through has been recognized in the periphery of some opinions. *Zafar*, 473 F.3d at 1352 (the Court remarked that there was no provision in 1255(i) to stay removal proceedings without discussing any implications of the ameliorative Congressional intent evident in the statute). *But see*, *Branch v. Smith*, 538 U.S. 254 (2003) (J. Stevens, concurring) (for the proposition that an omission from the wording of a statute may not be fatal and may be supplied by legislative history or general historical data which are often more helpful than maxims of statutory construction).

We remember first that it is axiomatic that the "the legislature meant something by all the provisions of the statute, and [courts] will endeavor to give them all a fair effect." *McChord v. Louisville*, 183 U.S. 483, 501 (1902)(quoting *Ill. Central Railroad Co. v. Commonwealth*, 64 S.W. Rep. 975 (C.A. Ill. 1901). From the face of 1255(i) we can glean it is an ameliorative provision seeking to render eligible for adjustment of status first time illegal entrants or others who are no longer in status and therefore unable to adjust. *See*, 8 U.S.C. § 1255(c).

The actual legislative history of the LIFE Act is sparse because it was developed outside of the usual Senate committee process. But we do have a "Joint Memorandum Concerning the Legal Immigration Family Equity Act of 2000," published on December 15, 2000, by the Chairman and the Ranking Member of the Subcommittee on Immigration, Senators Spencer Abraham and Edward M. Kennedy.

> [The LIFE Act] sought to provide a new mechanism to address the problem created by the long backlog of immigrant visa applications for spouses and minor children of lawful permanent residents, who are currently having to wait many years for a visa to become available to them. . . .
>
> Second, the LIFE Act sought to correct past administrative mistakes that resulted in the wrongful denial of adjustment of status to hundreds of thousands of persons who should have qualified for permanent residence under the Immigration Reform and Control Act of 1986 [IRCA]...

146 Cong. Rec. S11850-02 (daily ed. Dec. 15, 2000) (statement of Sen. Kennedy).

Congress sought to ameliorate the long backlog of immigrant visa applications through this Act. Similarly (although this case is unrelated to IRCA) Congress sought in principle to correct situations where the government is engaged in wrongful denial of adjustment. Nowhere does the Joint Memorandum state that Congress expects the wheels of removal which grind faster than those of adjudication to thwart the opportunity thus granted by Congress. Nor can we infer from the language of the statute and its sparse history that Congress contemplated removal of aliens benefitted by 1255(i) for the same infirmities to admissibility that the LIFE Act forgives. It is truly doubtful that Congress intended the government to initiate removal proceedings while this lengthy process culminating in adjustment was still moving slowly due to the government's own delays.

We do not argue that the government does not have the power, and indeed the Congressional mandate, to remove grandfathered aliens for criminal offenses or any other grounds in 8 U.S.C. § 1227. However, it is not possible to reconcile the LIFE Act with the government's wholesale removal of grandfathered aliens who come to its attention merely because of their present illegal status, where the illegal status is due to the same infirmities excused by the LIFE Act, i.e., lack of inspection and admission or overstaying one's authorized stay. *See*, 8 U.S.C. §§ 1255(a) & (c). 3. Once the removal proceedings start then the tension heightens, this time between the provisions of the LIFE Act and the jurisdiction stripping provisions of 1252(a)(2)(B). The jurisdiction stripping provisions removing discretionary decisions from judicial review are necessarily going to come into conflict when a grandfathered alien is in proceedings. Continuances will be requested; out of time motions to reopen will be filed; the courts of appeal will lean one way or another, towards the ameliorative features of the Act or towards a decision impelled by the Constitutional imperatives of their curtailed jurisdictions.

4. Pursuant to Supreme Court Rule 10(a) and (c) we ask this august Court to grant a writ of certiorari based not only on the conflicting decisions of several courts of appeal on an important matter of federal law, but also because several courts of appeal have decided an important questions of federal law which should be settled by this Court.

5. In view of the serious conflict in three mentioned sections of the Act, we further ask this august Court to

hold that the LIFE Act requires: (a) that the government refrain from commencing removal proceedings for grandfathered allies, regardless of the point at which the adjudication of multiple applications may be, and provided that delays are attributable to the government, where the only basis for removal is an overstay of authorized stay or illegal presence without admission or parole until there is a final denial of adjustment under the LIFE Act; and (b) for those grandfathered aliens, such as Petitioner who have already had their final orders of removal entered and are now eligible for adjustment *but for* the final order of removal, that the agency and/or the Board prescribe a period of one year from the date of this decision during which the alien can reopen his case and apply for adjustment.

6. This argument regarding the conflict between Sections 1255(i), 1229a and 1252(a)(2)(B) has been brought up below in discussing why a reopening should have been granted in this case. But perhaps it has not been presented quite as sharply as it has now. But under this Court's own precedent even if this argument were brought for the first time on appeal it may be entertained by the Court to prevent a manifest injustice not only to this Petitioner but others similarly situated. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

CONCLUSION

For the above mentioned reasons, we ask the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

CHRISTOPHER HELT
THE HELT LAW GROUP, LLC
1754 West Lunt Avenue
Chicago, Illinois 60654
(312) 266-0531 x701
Toll free (888)739-6794
Facsimile (312) 881-4138

Attorneys for Petitioner

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 7, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-61005
Summary Calendar

HUSAIN RAFIK KURJI

Petitioner

v.

MICHAEL B MUKASEY,
U.S. ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A78 567 258

Before DAVIS, GARZA, and PRADO, Circuit Judges.

PER CURIAM:*

Husain Rafik Kurji, a native and citizen of India, petitions this court for review of the Board of Immigration Appeals' (BIA's) denial of his motion to reopen his removal proceedings on the basis that his

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

motion to reopen was untimely and did not demonstrate exceptional circumstances meriting a sua sponte reopening of the proceedings pursuant to 8 C.F.R. § 1003.2(a). Kurji also petitions this court for review of the BIA's denial of his motion to reconsider the denial of his motion to reopen.

Kurji does not dispute the BIA's determination that his motion to reopen was untimely and argues instead that the BIA erred in denying his motion to reopen because he did not become eligible for the adjustment of status justifying the reopening his proceedings until after the 90-day filing period set forth in § 1003.2(c)(2) had expired. He further contends that this court should toll the 90-day period because the BIA has been inconsistent and arbitrary in its decisions whether to sua sponte reopen proceedings in similar cases. However, this court does not have jurisdiction to consider the BIA's refusal to sua sponte reopen Kurji's proceedings. *See Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008).

Although Kurji also argues that the BIA did not give sufficient reasons for its denial of his motion to reopen, the BIA's reasons for denial were adequate. Kurji additionally argues that the BIA violated the "constitutional avoidance doctrine" by arbitrarily depriving him of his liberty and property interests when it denied his motion to reopen. However, this argument lacks merit because there is no liberty interest at stake in a motion to reopen. *See Altamirano-Lopez v. Gonzales*, 435 F.3d 547, 550 (5th Cir. 2006). Kurji further

asserts that his motion to reopen's reliance on § 245 of the LIFE Act "may" trump § 1003.2(c)(2), which would transform his motion to reopen into a statutory, rather than a regulatory, right and thus "raise[] concerns" under the Due Process and Equal Protection Clauses. However, he has failed to brief this issue, and thus he has abandoned it. *See Soadjede v. Ashcroft*, 324 F.3d 830, 833 (5th Cir. 2003); *Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986).

Accordingly, Kurji's petition for review is DENIED.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED NOVEMBER 27, 2007

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: NOV 27 2007

File: 78 567 258 - Houston, TX

In re: HUSAIN RAFIK *KURJI*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Christopher W. Helt, Esquire

ORDER:

PER CURIAM. The motion to reopen, filed on June 11, 2007, has been filed out of time. The Board dismissed the respondent's appeal on April 27, 2004, and declined to reconsider that decision on July 9, 2004. A motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. *See* 8 C.F.R. § 1003.2(c)(2).

The motion was therefore filed almost 3 years late. The Department of Homeland Security (the "DHS") has not responded to the pending motion, which will be denied.

The respondent argues that he is the beneficiary of an 1-140 visa petition that was approved on October 18, 2005, long after the time for filing a timely motion to reopen had expired, and states that he wishes to seek adjustment of status. We could only reopen proceedings under our *sua sponte* authority pursuant to 8 C.F.R. § 1003.2(a), which the respondent apparently urges us to do. We take this action only in "exceptional situations." *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); *see also Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004) (Court lacks jurisdiction to review Immigration Judge's refusal to exercise *sua sponte* authority). We do not find that this is such an exceptional situation. The motion is, therefore, denied.

s/ Frederick D. Hess
FOR THE BOARD

(2)
Supreme Court, U.S.
FILED
081478 APR 2 - 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-

IN THE

Supreme Court of the United States

HUSAIN RAFIK KURJI,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

CHRISTOPHER HELT
THE HELT LAW GROUP, LLC
1754 West Lunt Avenue
Chicago, Illinois 60654
(312) 266-0531 x701
Toll free (888)739-6794
Facsimile (312) 881-4138

Attorneys for Petitioner

222109

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

APPENDIX A — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED APRIL 27, 2004

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-567-258 – HOUSTON

In re: KURJI, HUSAIN RAFIK

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mendoza, John L., Esquire

ON BEHALF OF DHS: Merilee Fong, Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

s/ [illegible]
FOR THE BOARD

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED JULY 9, 2004

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-567-258 – HOUSTON

In re: KURJI, HUSAIN RAFIK

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Helt, Christopher W, Esquire

ON BEHALF OF DHS: Merilee Fong

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated April 27, 2004. In that decision, we summarily affirmed the Immigration Judge's decision. The respondent asks us to reconsider, claiming that a summary decision is not appropriate where the Immigration Judge's adverse credibility finding was erroneous, or where the Immigration Judge failed to fully develop the record by requesting an advisory opinion from the Department of State. First, the

Appendix B

Immigration Judge's thorough and well-reasoned decision sets forth many specific reasons for his adverse credibility determination, and the respondent failed to challenge it on appeal. Second, the record contains four country reports and profiles prepared by the Department of State on the conditions in India. The burden is on the respondent, as an asylum applicant, to provide documentary support for material facts which are central to his claim. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997). It is the duty of the Immigration Judge, when relying on country conditions in adjudicating the respondent's case, to make the source of his knowledge of the particular country a part of the record. Id. It is clear that the Immigration Judge met his burden to protect the record. We find no merit in either of the respondent's contentions in his motion for reconsideration. There is no error of fact or law in our prior decision. Accordingly, the motion is denied.

s/ [illegible]
FOR THE BOARD

(3)

FILED
SEP - 2 2009

No. 08-1478

In the Supreme Court of the United States

HUSAIN RAFIK KURJI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
SAUL GREENSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner's petition for review, which challenged the Board of Immigration Appeals' decision not to reopen his removal proceedings *sua sponte*.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Arai, In re, 13 I. & N. Dec. 494 (B.I.A. 1970) 2
Dada v. *Mukasey*, 128 S. Ct. 2307 (2008) 12
Enriquez-Alvarado v. *Ashcroft*, 371 F.3d 246 (5th Cir. 2004) 10
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 9
G-D-, In re, 22 I. & N. Dec. 1132 (B.I.A. 1999) 3
INS v. *Abudu*, 485 U.S. 94 (1988) 3, 12
INS v. *Doherty*, 502 U.S. 314 (1992) 3
Kurji v. *Gonzales*, 140 Fed. Appx. 549 (5th Cir. 2005) 5, 6
NCAA v. *Smith*, 525 U.S. 459 (1999) 9
Patel, In re, 17 I. & N. Dec. 597 (B.I.A. 1980) 2, 12
Ramos-Bonilla v. *Mukasey*, 543 F.3d 216 (5th Cir. 2008) 7, 12
Tamenut v. *Mukasey*, 521 F.3d 1000 (8th Cir. 2008) 11
Zhao v. *Gonzales*, 404 F.3d 295 (5th Cir. 2005) 10

Convention, statutes and regulations: Page

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 4

Homeland Security Act of 2002, Pub. L. No. 107-296, § 1517, 116 Stat. 2311 2

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-593 11

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

8 U.S.C. 1158(a)(2)(B) 4

8 U.S.C. 1227(a)(1)(B) 4

8 U.S.C. 1229a 8

8 U.S.C. 1229a(c) 10

8 U.S.C. 1229a(c)(6) (Supp. II 1996) 11

8 U.S.C. 1229a(c)(7) 2, 11

8 U.S.C. 1229a(c)(7)(A) 3

8 U.S.C. 1229a(c)(7)(B) 2

8 U.S.C. 1229a(c)(7)(C) 11

8 U.S.C. 1229a(c)(7)(C)(i) 3

8 U.S.C. 1229a(c)(7)(C)(iv) 11

8 U.S.C. 1252(a)(2)(B)(ii) 8, 10, 12

8 U.S.C. 1252(d)(1) 9

8 U.S.C. 1255 (§ 245) 1, 2

8 U.S.C. 1255(i) 2, 7, 8, 10, 11, 12

8 U.S.C. 1255(i)(2) 2

Statute and regulations—Continued: Page

5 U.S.C. 701(a)(2) 11
8 C.F.R.:
Section 3.2(c)(2) (1997) 11
Section 1003.1(e)(4) 5
Section 1003.2(a) 3
Section 1003.2(c) 2
Section 1003.2(c)(1) 3
Section 1003.2(c)(2) 3, 6, 8, 10, 11
Section 1003.2(c)(3) 11

Miscellaneous:

61 Fed. Reg. (1996):
p. 18,901 11
p. 18,905 11

In the Supreme Court of the United States

No. 08-1478

HUSAIN RAFIK KURJI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 306 Fed. Appx. 129. The decision of the Board of Immigration Appeals (Pet. App. 4a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. The petition for a writ of certiorari was filed on April 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. 1255, provides that the Attorney General may, in his or her discretion, adjust the status

of certain aliens to that of a lawful permanent resident.[1] As relevant here, an alien who is physically present in the United States as of December 21, 2000, and is the beneficiary of an approved application for labor certification filed on or before April 30, 2001, may apply to the Attorney General for adjustment of status. 8 U.S.C. 1255(i). Several prerequisities must be met, including that the alien must be "eligible to receive an immigrant visa," be "admissible to the United States for permanent residence," and have "an immigrant visa * * * immediately available to" him. 8 U.S.C. 1255(i)(2).

Even if all of the statutory prerequisities are met, adjustment is not automatic. "The grant of an application for adjustment of status under section 245 [8 U.S.C. 1255] is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). The Board shall not grant the motion to reopen "unless it appears to the

[1] The reference to the Attorney General in Section 1255(i) also encompasses the Secretary of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1517, 116 Stat. 2311.

Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1). An alien may file only one such motion to reopen, and it generally must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If an alien does not file his motion to reopen within the 90-day time period, the Board may reopen his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of India. Pet. App. 1a. He was admitted to the United States in December 1999 as a non-immigrant visitor and remained in the United States beyond the time authorized. Administrative Record (A.R.) 142. On August 23, 2002, the former Immigration and Naturalization Service charged

him with being removable as an alien who overstayed his visa. A.R. 142, 354-355; see 8 U.S.C. 1227(a)(1)(B).

Petitioner conceded that he was removable as charged and sought withholding of removal, protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, and voluntary departure. A.R. 142-143, 160-161, 170-171.[2] Petitioner claimed that, if he returned to India, he would be persecuted or tortured because he is Muslim. A.R. 143. An immigration judge (IJ) held a hearing, at which petitioner was the only witness. A.R. 167-206.

The IJ determined that petitioner was removable as charged, denied his claims for withholding of removal and CAT protection, and denied his request for voluntary departure. A.R. 142-152. Petitioner had testified that he was arrested by the police once or twice in 1997 or 1998; that he was beaten up by five or six Hindus on several occasions; and that, when he attempted to file a complaint with the police, the police would not accept his complaint. A.R. 143-145. After recounting petitioner's testimony, the IJ made an adverse credibility finding, observing that petitioner's testimony was "inconsistent with his application for [withholding of removal], internally inconsistent, vague, implausible, and not supported by documents which should have been readily available and should have been presented." A.R. 146. The IJ explained that petitioner's testimony about when he was

---

[2] Contrary to the assertion in his petition (Pet. 6-7), petitioner did not seek asylum. As his attorney explained to the immigration judge, petitioner only sought withholding of removal and CAT protection because an asylum application would have been untimely under the one-year bar in 8 U.S.C. 1158(a)(2)(B). See A.R. 170-171.

arrested appeared to be "deliberately vague" and was "so equivocal as to be beyond belief"; that petitioner did not present any documents to corroborate his claimed injuries; and that petitioner gave conflicting accounts of the same events, so that "it appeared that [petitioner] was making up his story as he went along." A.R. 146-148. The IJ found it particularly troubling that petitioner presented "no travel documents or identity documents to establish his identity." A.R. 147.

Even if petitioner's testimony were credible, the IJ determined, his claims for withholding of removal and CAT protection failed on their merits because petitioner failed to show a likelihood of persecution or torture. A.R. 149-150. And the IJ denied petitioner's request for voluntary departure, explaining that he was ineligible for that benefit because he could not establish his identity. A.R. 150. The IJ therefore ordered petitioner removed to India. A.R. 151.

3. The Board affirmed the IJ's decision without a separate opinion, making it the final agency decision. Pet. Supp. App. 1a; see 8 C.F.R. 1003.1(e)(4). Petitioner filed a motion to reconsider, which the Board denied. Pet. Supp. App. 2a-3a. The Board explained that "the Immigration Judge's thorough and well-reasoned decision sets forth many specific reasons for his adverse credibility determination"—which petitioner "failed to challenge * * * on appeal"—and held that there was "no error of fact or law in [its] prior decision." *Ibid.*

4. The court of appeals denied petitioner's petitions for review of the Board's decisions in an unpublished, per curiam decision. *Kurji* v. *Gonzales*, 140 Fed. Appx. 549 (5th Cir. 2005). The court determined that the IJ's adverse credibility finding was supported by substantial evidence, because "the IJ provided many cogent reasons

for finding that [petitioner] was not credible," which were "amply supported by the record," and it rejected petitioner's various claims of procedural error. *Id.* at 549-550.

5. Almost three years after he was ordered removed, petitioner filed a motion to reopen his proceedings with the Board. A.R. 51-78. He sought reopening in order to apply for adjustment of status because an application for labor certification filed on his behalf recently had been approved. A.R. 52-60.

The Board denied petitioner's motion to reopen. Pet. App. 4a-5a. The Board explained that "[a] motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision." *Id.* at 4a (citing 8 C.F.R. 1003.2(c)(2)). Applying that rule, the Board determined that petitioner's motion to reopen was "filed almost 3 years late." *Id.* at 5a. The Board also declined to exercise its *sua sponte* reopening authority to permit consideration of petitioner's application for adjustment of status, because petitioner failed to demonstrate that this case presented an "exceptional situation" warranting such relief. *Ibid.*

Petitioner filed a petition for review of the Board's decision with the court of appeals. He also filed a motion to reconsider with the Board, contending that he was not required to abide by the 90-day filing deadline for his motion to reopen because he had not become eligible to adjust his status until recently. A.R. 10-12.

The Board denied the motion to reconsider. A.R. 2. It explained: "Becoming eligible for relief from removal after a final administrative order has been entered, and after the time allowed for filing a motion to reopen has elapsed, is common and does not, in itself, constitute an

exceptional circumstance warranting [the Board's] consideration of an untimely motion." *Ibid.* A contrary holding, the Board explained, would "vitiate the statutory and regulatory deadlines, which are designed to bring finality to immigration proceedings." *Ibid.*

Petitioner filed a petition for review of the Board's denial of his motion for reconsideration, which the court of appeals consolidated with his then-pending petition for review of the Board's denial of reopening.

6. The court of appeals denied the consolidated petitions for review in an unpublished, per curiam decision. Pet. App. 1a-3a. The court observed that petitioner's motion to reopen was untimely, so that his proceedings could only be reopened if the Board exercised its *sua sponte* reopening authority. *Id.* at 2a. The court then explained that it could not review the Board's decision not to invoke that authority here, because it "does not have jurisdiction to consider the [Board's] refusal to sua sponte reopen [petitioner's] proceedings." *Ibid.* (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)).

The court also rejected petitioner's arguments that the Board "did not give sufficient reasons for its denial of his motion to reopen" and that the denial of reopening violated his due process rights, explaining that the Board's reasons were adequate and that petitioner had no liberty interest at stake in his motion to reopen. Pet. App. 2a. Finally, the court rejected petitioner's assertion that 8 U.S.C. 1255(i)'s authorization for certain aliens to seek adjustment of status "trump[s]" the statutory and regulatory time limitation for the filing of a motion to reopen, explaining that petitioner "abandoned" that issue by "fail[ing] to brief" it. Pet. App. 3a.

ARGUMENT

Petitioner seeks review (Pet. 8-20) of the court of appeals' denial of his petition for review, which challenged the Board's denial of *sua sponte* reopening. In particular, he contends (Pet. i, 15) that three provisions of the INA—8 U.S.C. 1255(i), 8 U.S.C. 1229a, and 8 U.S.C. 1252(a)(2)(B)(ii)—are "fundamentally conflicting" because 8 U.S.C. 1255(i) authorizes certain aliens to apply for adjustment of status, but 8 U.S.C. 1229a requires that an alien file any motion to reopen to seek adjustment of status within 90 days of entry of a final order of removal, and 8 U.S.C. 1252(a)(2)(B)(ii) limits judicial review of certain discretionary determinations by the Board.

Petitioner failed to brief that issue to the court of appeals, and the court of appeals found it had been abandoned. Moreover, petitioner failed to present that argument to the Board, which means that the federal courts lack jurisdiction to review it. In any event, there is no disagreement in the courts of appeals on the issue petitioner attempts to present, and the court of appeals' decision is correct. Further review therefore is unwarranted.

1. The certiorari petition should be denied because petitioner did not brief the issue upon which he seeks review to the court of appeals or the Board. As the court of appeals explained, although petitioner asserted in passing that 8 U.S.C. 1255(i) "'may' trump" the time limitations for reopening contained in 8 C.F.R. 1003.2(c)(2), petitioner "failed to brief this issue, and thus he has abandoned it." Pet. App. 3a; see Pet. 20 (acknowledging that "perhaps" he should have presented

the issue more "sharply" to the court of appeals).[3] As a result, the court did not consider the issue. This Court ordinarily does not address issues that were not passed upon by the courts below. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); see also *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks omitted).

Not only did petitioner fail to brief the issue before the court of appeals, but he did not present it to the Board either. As a result, the federal courts lack jurisdiction to consider it. See 8 U.S.C. 1252(d)(1) (courts cannot consider claims an alien failed to exhaust before the agency). Petitioner offers no explanation for his failure to present the issue below, and this Court therefore should not depart from its ordinary practice and reach out to consider the issue in the first instance.

2. Contrary to petitioner's contention (Pet. 8-15), there is no circuit conflict on the question petitioner attempts to present. As an initial matter, the unpublished and fact-bound decision below does not establish binding circuit precedent and it therefore could not give rise to a circuit conflict of the sort that might warrant this Court's review even if the court had addressed the merits of petitioner's claim.

---

[3] Although petitioner filed two briefs with the court of appeals, the only mention of the issue upon which he seeks review is the following passing assertion, which appeared in a supplemental brief: "Petitioner's reliance on § 245(i) of the LIFE Act (2000) may even trump bars under 8 C.F.R. § 1003.2(c)(2), transforming motions to reopen into a statutory *rather than* regulatory right for aliens. Thus the petitioner's outcome also raises concerns under the Constitution's Equal Protection and Due Process Clause as well." Pet. Supp. C.A. Br. 8 (2008 WL 5972266); see generally Pet. C.A. Br. 5-9 (2008 WL 5972265) (argument section).

In any event, petitioner has not identified any court of appeals that has considered—let alone accepted—the argument that the 90-day time limitation contained in 8 U.S.C. 1229a(c) and 8 C.F.R. 1003.2(c)(2) does not apply when aliens seek adjustment of status under 8 U.S.C. 1255(i). To the contrary, he appears to acknowledge that no court of appeals has addressed the argument. See Pet. 16 ("Generally the Circuit courts have not faced head on this issue."); see also Pet. 6. The cases petitioner cites (Pet. 8-9, 12-15) as evidence of a circuit conflict address when a continuance should be granted, in a case still pending before the IJ, to permit the alien to seek adjustment of status.[4] But petitioner never sought to continue his removal proceedings in order to pursue adjustment of status, and he readily acknowledges that he "may not equate [his] case with the continuance cases" because his case concerns a denial of *sua sponte* reopening, which "no court in the land" has found reviewable, Pet. 15; see p. 11, *infra*, rather than a continuance denial.

3. The court of appeals' decision is correct. The relevant statute and regulation clearly provide that a motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened."

---

[4] Petitioner also cites (Pet. 13-14) *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 249-250 (5th Cir. 2004), and *Zhao* v. *Gonzales*, 404 F.3d 295, 303 n.6 (5th Cir. 2005). But *Enriquez-Alvarado* holds that the courts of appeals lack jurisdiction to review the Board's denial of *sua sponte* reopening, and every circuit that has considered that issue has agreed. See p. 11, *infra*. And *Zhao* addresses whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of denials of motions to reopen; that question is not presented here because this case concerns *sua sponte* reopening. See pp. 12-13, *infra*.

8 C.F.R. 1003.2(c)(2); see 8 U.S.C. 1229a(c)(7)(C). That rule is subject to limited exceptions, see 8 U.S.C. 1229a(c)(7)(C)(iv); 8 C.F.R. 1003.2(c)(3), but petitioner does not contend that any of them applies here. Petitioner filed his motion to reopen almost three years late; accordingly, his proceedings could only be reopened if the Board exercised its *sua sponte* reopening authority. Pet. App. 2a.

The court of appeals correctly held that it could not review the Board's denial of *sua sponte* reopening. The unanimous view of the courts of appeals is that such a claim is unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. 701(a)(2), and there are no judicially manageable standards for reviewing such a decision, see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003-1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals). Petitioner acknowledges that there is no disagreement in the circuits on this point. See Pet. 15; see also Pet. 11-12.

Moreover, there is no merit to petitioner's argument that the time limitation for filing a motion to reopen must yield when an alien seeks to adjust his status under 8 U.S.C. 1255(i). For a number of years, the immigration laws have contained a time limitation for filing a motion to reopen. See, *e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-593 (enacting 8 U.S.C. 1229a(c)(6) (Supp. II 1996) (current version at 8 U.S.C. 1229a(c)(7)); 61 Fed. Reg. 18,901, 18,905 (1996) (8 C.F.R. 3.2(c)(2) (1997)). That limitation helps to further the interest in the finality of removal proceedings and to ensure that aliens illegally present in the United States do not use motions to re-

open to prolong their stay. See, *e.g.*, *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008); *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). Nothing in 8 U.S.C. 1255(i) purports to override that congressional judgment. Section 1255(i) does not afford every eligible alien a right to adjust his status; it affords an alien the opportunity to adjust his status, which is subject to the discretion of the Attorney General or Secretary of Homeland Security. See, *e.g.*, *In re Patel*, 17 I. & N. Dec. 597, 601 (1980). There is therefore no basis to conclude that Section 1255(i) "trumps" the time limitation for filing a motion to reopen.

4. The petition need not be held for this Court's decision in *Kucana* v. *Holder*, cert. granted, No. 08-911 (oral argument scheduled for Nov. 10, 2009). The question presented in *Kucana* is whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the Board of Immigration Appeals' denial of an alien's motion to reopen his immigration proceedings. Pet. at i, *Kucana* v. *Holder*, *supra* (No. 08-911). *Kucana* is not relevant to this case because the court of appeals did not rely on (or even mention) Section 1252(a)(2)(B)(ii) in its decision. Pet. App. 2a. Instead, the court of appeals determined that it lacked jurisdiction to review the Board's denial of *sua sponte* reopening because that action is committed to the agency's discretion by law. See *ibid.* (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (holding that, because the regulation regarding *sua sponte* reopening "gives an IJ or the [Board] complete discretion to deny untimely motions to reopen, the reviewing court has no legal standard by which to judge the IJ's ruling, and therefore the court lacks jurisdiction")). Indeed, petitioner never even mentioned Section 1252(a)(2)(B)(ii) to the court of appeals. Accord-

ingly, it is extremely unlikely that *Kucana* would have any bearing on the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
SAUL GREENSTEIN
Attorneys

SEPTEMBER 2009